Supreme Court, U.S.
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No. 02-1389

In the

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

ABEL COSMO GALLETTI and SARAH GALLETTI;
FRANCESCO BRIGUGLIO and ANGELA BRIGUGLIO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

A. LAVAR TAYLOR
CHARLES F. ROSEN
LAW OFFICES OF
A. LAVAR TAYLOR
6 Hutton Centre
Suite 880
Santa Ana, CA 92707
(714) 546-0445
Co-Counsel for Respondents

JOEL BARRY FEINBERG
Counsel of Record
DAVID R. HABERBUSH
HABERBUSH &
CAMPBELL, LLP
444 West Ocean Blvd.
Suite 1400
Long Beach, CA 90802
(562) 435-3456
Attorneys for Respondents

QUINN & TAYLOR • (202) 393-2141 • HTTP://USSCINFO.COM

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QUESTION PRESENTED

What steps must the Internal Revenue Service take to collect a tax liability owed by a general partnership from a general partner of that partnership?

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STATEMENT

Respondents are general partners of Marina Cabrillo Partners ("The Partnership"). The Partnership filed federal employment tax returns showing balances owed at various times between 1992 and 1995. The Internal Revenue Services ("IRS") made assessments of the taxes shown on those returns (which named The Partnership) between 1992 and 1996. The IRS did not make any assessments against the Respondent partners individually.

The IRS failed to file assessments naming the Respondents and failed to provide statutory notice and demand for payment. Despite these failures, the IRS claims to have taken collection action against the Respondent partners in an effort to collect the taxes. These collections efforts included the filing of notices of federal tax liens against Respondents individually. See, Joint Appendix at p.100-104, which shows that the Proof of Claims filed against Respondents in their bankruptcy cases were mostly secured claims, based upon notices of federal tax liens filed against Respondents in 1998.

The Gallettis' filed their joint voluntary chapter thirteen petition on October 20, 1999 and the Briguglios' filed a joint voluntary chapter thirteen petition on February 4, 2000. The Briguglios and Gallettis' ("Respondents") learned of the IRS' secured claims against them from the Proof of Claims which the IRS filed in their respective bankruptcies. Joint Appendix at p. 100 to 104.

The IRS's secured claim filed against the Galletti's, in the amount of $395,006.37, consisted of over $240,000 in penalties and interest which had accumulated in the five to six year period between the

date the taxes were first due and the date of their bankruptcy petition. The IRS' secured claim against the Briguglio's in the amount of $403,264.06, consisted of over $265,000 in penalties and interest which had accumulated in a five to six and a half year period between the tax period and the Briguglios' bankruptcy petition. Thus, over sixty percent (60%) of each of these secured claims against the Respondents consisted of interest and penalties which had been accumulating unbeknownst to the Respondents. Only The Partnership was named on the assessment, and there is no evidence in the record that notice and demand for payment pursuant to IRC §6303 had been given to the individual Respondents.

SUMMARY OF ARGUMENT

The IRS timely assessed federal employment tax obligations against The Partnership, but failed to name Respondents in the assessment documents and failed to provide notice and demand for payment to Respondents. I.R.C. §6303 requires that the IRS *shall*, within sixty days, give notice and demand payment *to each person liable for the unpaid tax.* When the employment taxes remained unpaid, the United States sought to enforce this tax liability against the Respondents who were primarily liable (due to the joint and several liability under California state law) for the debts of The Partnership.

This case poses the question of whether Respondents, as general partners, are primarily liable or secondarily liable for the collection of employment taxes which the partnership "employer" failed to remit. If Respondents are primarily liable for the partnership taxes, then – as the Ninth Circuit held – the IRS must

make timely assessments against the Respondents individually in order to collect the taxes from Respondents (or must sue Respondents) before the expiration of the three year period of limitations on assessments as set forth in I.R.C. §6501. The assessment "triggers" the notice and demand for payment of the amount past due as required in I.R.C. §6303.

If Respondents are secondarily liable for the partnership taxes, then the Ninth Circuit's ruling that the IRS must assess the Respondents to collect the partnerships taxes is incorrect. Nevertheless, the Ninth Circuit's *conclusion* that it is now too late for the IRS to pursue Respondents for the partnerships taxes is correct even if Respondents are secondarily liable for the partnership taxes. Because the United States argues that the IRS may collect partnership taxes from general partners at any time during the ten-year period of limitations governing collection action against The Partnership, this Court, if it concludes that Respondents are secondarily liable for the partnership taxes, must address the issue of whether the IRS may invoke state law to assert secondary liability against Respondents without being bound by the state period of limitations.

The IRS frames the issue presented as "[w]hether, in order to enforce the derivative liability of partners for tax debts of their partnership, the United States must make a separate assessment of the taxes owed by the partnership against each of the partners directly." In phrasing the issue presented in this manner, the United States assumes that partners are secondarily (or, as the United States says, "derivatively") liable for partnership taxes. The manner in which the United States poses the question

presented avoids the issue: Whether the partners are primarily liable for the tax and thus subject to the same assessment and collection procedures as the partnership itself? The Ninth Circuit held that partners are taxpayers and are primarily liable for partnership taxes. This Court must address the issue of primary versus secondary liability before addressing the issue of whether the IRS may seek to collect the taxes from a general partner at any time during the ten-year period of limitations on collection, which applies to the assessed partnership, without first making an assessment against the individual partners.

The question of whether partners of general partnerships which owe taxes should be treated as primarily liable or secondarily liable, for purposes of IRS collection procedures, is not easily answered. This point was acknowledged over thirty years ago by the IRS in an internal memorandum now available to the public. In General Counsel Memorandum 34329 (July 30, 1970), IRS counsel addressed an inquiry from the IRS as to whether the IRS should assess a partnership or the general partners of a partnership which owed excise taxes. IRS counsel advised the IRS that the IRS should assess *both the partnership and the general partners* for the partnership's taxes because of the conflicting authorities in this area[1].

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[1] Interestingly, the IRS concedes that it cannot assess the partnership tax naming the general partners of the partnership and does not have available the summary collection process. See Brief for the United States, p. 28 where it states "Under the abbreviated limitations period that would result from the decision in this case, however, the government *would be forced* to bring collection suits against partners within the three-year period prescribed by I.R.C. §6501(a), even though parallel efforts against the partnership may remain ongoing". (emphasis supplied)

The United States now claims that it will lose over $10 billion in the event it does not prevail in this case because the IRS has made assessments of taxes owed by general partnerships naming only the partnerships, without naming the partners. Brief for the United States, p.27.[2] The reason the IRS finds itself in this a situation is because it failed to follow the advice of its own attorneys. General Counsel Memorandum 34329, *supra*. The IRS's $10 billion "wound" will be completely self-inflicted if it comes to pass.

The failure of the IRS to follow the advice of its own counsel is particularly surprising given that it can easily make assessments for the general partners for partnership taxes. Every partnership is required to file an annual information return, Form 1065, which reflects partnership income (or losses) and contains a copy of the Form K-1 issued to each partner of the partnership. See I.R.C. §6031(a), Treas. Reg. § 1.6031(a)-1, IRS Form 1065 (2002). The Form K-1 issued to each partner contains the name, address and social security number (or tax identification number) of that particular partner. *Id.* Thus, it would be a relatively simple matter for the IRS to make an assessment against each general partner, based on the information in the Form K-1, for the partnership taxes.[3]

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[2] It is unclear how the IRS arrived at this $10 billion figure. The IRS, through counsel, declined Respondents' informal invitation to provide the supporting materials for this figure. It is also not clear what portion of the $10 billion figure is a) collectible from partnership assets without looking to the general partners, or b) uncollectible from both the partnerships and their general partners.

[3] In those cases where a new partnership files its employment taxes returns before it files its Form 1065, the IRS is not

The concept of assessing multiple persons who are jointly and severally liable for a single tax liability is not a novel concept. This happens every time a husband and wife file a joint income tax return.

Why, then, has the IRS been so vigorous in its challenge to the holding of the Ninth Circuit and the lower courts in the instant case? The IRS does not want to treat general partners as persons primarily liable for the taxes for assessment purposes, but at the same time, the IRS is attempting to collect partnership taxes by distraint from the general partners, the kind of action that can normally only be taken against persons who are primarily liable for the taxes. The IRS thus wants to avoid the "inconvenience" of making assessments for each general partner but wants the "convenience" of collecting the taxes from the partners

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prejudiced by the delay in receipt of the Forms K-1. This is because the three-year statute of limitations on assessing employment taxes does not run until April 15 of the year following the year in which the employment taxes accrue. I.R.C. § 6501(b)(2). The start of this three year period coincides with the "due date" of the Form 1065. I.R.C. §§ 6072(a) and 6031.

In addition, I.R.C. §6011(b) provides that the IRS is authorized to require such information with respect to "persons subject to the taxes imposed by chapter 21 [employment taxes] or chapter 24 [withheld income taxes] as is necessary or helpful in securing proper identification of such person." The IRS is empowered by this section, in conjunction with I.R.C. §6109(a) [supplying identifying numbers for persons], to require that quarterly partnership employment tax returns (Forms 941) include the names, addresses and identifying numbers of all general partners of the partnership as of the date on which the return is due. *See generally* Rev. Rul. 73-526, 1972-3 C.B. 404.

by the summary collection process (without having to file an action in court).

As discussed below, the IRS's conduct raises significant statutory and Constitutional concerns. Sustaining the Ninth Circuit's holding will allow the courts to avoid having to decide these statutory and Constitutional issues and will eliminate the need of the IRS to file an action in court every time it wants to pursue a general partner for taxes owed by a partnership. At the same time, the IRS will be able to administratively pursue collection action against general partners without running afoul of the Internal Revenue Code or the Constitution. Stated differently, a holding that Respondents should be treated as taxpayers primarily liable for the partnership taxes will facilitate the collection of partnership taxes by allowing the IRS to administratively pursue all parties who are primarily liable for the taxes.

ARGUMENT

THE INDIVIDUAL PARTNERS OF A GENERAL PARTNERSHIP ARE PRIMARILY LIABLE UNDER STATE LAW AND THEREFORE ARE TAXPAYERS WHO MUST EITHER BE SUED OR ASSESSED WITHIN THREE YEARS

Although the United States made a timely assessment naming The Partnership for its federal employment tax obligations, it did not assess or sue the individual partners within the statutory time limit. The general partners are taxpayers under the I.R.C. because they are jointly and severally liable with their partnership under California law. California Corp. Code §16306(a). Although this joint and several

liability of the Respondents arises from state law, the United States is precluded from collecting on this liability because, under California law, it must obtain a separate judgment against the partners. It did not do so and the time for obtaining a judgment against the Respondents had expired before they filed their respective bankruptcy petitions.

A. California Law Makes Partners Primarily Liable for Partnership Debts Because of Joint and Several Liability.

Virtually every state in the United States has statutory or case law which states that general partners of a partnership are liable for the all debts of the general partnership.[4]

[4] Ala. Code §10-8A-307(c)(2003), Alaska Stat. §32.06.307(c), Ariz. Rev. Stat. §29-1027(c)(2003), Ark. Code Ann. §4-46-307(c)(Michie 2003), Cal. Corp. Code. §16307(c)(West 2003), Colo. Rev. Stat. §7-64-307(3)(2003), Conn. Gen. Stat. §34-328(c)(2003), Del. Code Ann. tit. 6 §15-307(c)(2003), Fla. Stat. Ann. §620.8307(3)(West 2003), Ga. Code Ann. §9-2-26 (2002), Haw. Rev. Stat. §425-118(c)(2003), Idaho Code §53-5-307(c)(Michie 2003), 805 Ill. Comp. Stat. 206/307(c)(2003), *Thompson v. Wayne Smith Construction Co.*, 640 N.E.2d 408 (Ind. App. 1994), Iowa Code §486A.307(3)(2003), Kan. Stat. Ann. §56a-307(c)(2003), *Heavrin v. Lack Malleable Iron Co.*, 155 S.W. 729 (Ky. 1913), La. Code Civ. Proc. Ann. art. 737 (West 2003), *Gordon v. Texas Co.*,119 Me. 49 (1920), Md. Code Ann. Corps. & Ass'ns §9A-307(c)(2003), *Curnane v. Curnane*, 27 N.E.2d 714 (Mass. 1940), *Webber v. Richter*, 187 N.W. 528 (Mich. 1922), *Allgeier, Martin & Assoc. v. Ashmore*, 508 S.W.2d 524 (Mo. 1974), Minn. Stat. §323A.3-07(c)(2003), Miss. Code. Ann. §13-3-55(2003), Mont. Code. Ann. §35-10-312(c)(2003), Neb. Rev. Stat. §67-419(3)(2003), *Diamond Nat'l Corp. v. Thunderbird Hotel, Inc.*, 85 Nev. 271 (1969), N.J. Stat. Ann. §42:1A-19(c) (West 2003), *Rosenblum v. Judson Eng'g Corp.*, 99 N.H. 267 (1954), N.M.Stat. Ann. §54-1A-307(c)(Michie 2003), *Dwiggins v. Parkway Bus* Co., 230 N.C. 234 (1949), Spencer *Kellogg & Sons, Inc. v. Bush*, 31 Misc. 2d 70 (N.Y. 1961), N.D. Cent. Code §45-15-07(3)(2003), *Bennett v. Oberlin Bakeries Co.*, 1 Ohio Law Abs 870 (1923), Okla. Stat. Tit. 54, §1-307(c)(2002), Or. Rev. Stat. §67.110(3)(2003), *Nisenzon v. Sandowski*, 689 A.2d 1037 (R.I. 1997), *Mansour v. Massey*, 287 S.C. 176 (1985), S.D. Codified Laws §48-7A-307(c)(Michie 2003), Tenn. Code Ann. §61-1-307(c)(2003), Tex. Rev. Civ. Stat. Ann. art.6132b-3.05(c)(2003),*Hamner v. B.K. Bloch & Co.*, 52 P.770 (Ut. 1898), *Tax Review Board v. D. H. Shapiro Co.*, 409 Pa. 253 (1962), Vt. Stat. Ann. tit. 11, §3227(c)(2003), Va. Code Ann. §50-73.97(c)(Michie 2003), Wash. Rev. cod Ann. §25.05.130(3)(West 2003), W.Va. Code §47B-3-7(c)(2003), *Ch2M Hill, Inc. v. Black & Veatch*, 557 N.W.2d 829 (Wis. 1996), Wyo. Stat. Ann. §17-21-307(c)(Michie 2003).

The nexus between a general partnership and its general partners is substantively different from the relationship between other taxpayers and the parties which the IRS might seek to hold secondarily liable using the methods described above. A general partner is jointly and severally for the entire amount of a partnership's tax debt merely by virtue of being a general partner at the time the tax debt arose. *See* Cal.Corp. Code §16306. Black's Law Dictionary defines joint and several liability as:

> [T]he liability of copromisors of the same performance when each of them, individually, has the duty of fully performing the obligation, and the obligee can sue all or any of them upon breach of performance. . . *Such liability permits the Internal Revenue Service to collect a tax from one or all of several taxpayers.* A husband and wife that file a joint income tax return usually are collectively or individually liable for the full amount of the tax liability. I.R.C. §6013.

Black's Law Dictionary 837 (6th ed. 1990). (emphasis

added)

Other third parties subject to potential claims of secondary liability for taxes owed by taxpayers, unlike general partners, will normally be held liable only for a portion of the taxes owed by the original taxpayer. See, e.g., I.R.C. §§ 3505, 6672, and 6324 and the discussion below. While it is possible that some of these other third parties could eventually be subject to a claim up to the entire amount of the taxes owed by the original taxpayer (i.e., such as where property equal to or in excess of the amount of gift or estate tax owed is transferred to a transferee), these other third parties are not jointly and severally liable for the full amount of the tax owed by the original taxpayer.

This is not the case with general partners of partnerships that owe taxes. The fact that they are general partners, a fact that can normally be ascertained from the Forms K-1 submitted with each annual partnership Form 1065,[5] means that they are primarily liable for the entire amount of the taxes owed by the partnership. The issue is not whether general partners can be held liable for the tax debts of the general partnership. What is at issue is the manner in which the IRS *enforces* the liability against the general partners for partnership tax debt. The Respondents are liable for the Partnership's debts; however, these debts are not collectible because the period of limitations have passed. The bankruptcy court

[5] It may also be possible for the IRS to ascertain the identity of general partners from documents filed under state law. *See* Cal. Corp. Code §16303. California Form GP-1, filed pursuant to I.R.C. §16303, asks that the partnership list the full names and mailing addresses of all partners or that the partnership provide the full name and mailing address of an agent who will maintain a list of the names and mailing addresses of all partners.

properly sustained the Respondent/debtors' objections to the Proof of Claims of the IRS because they are "unenforceable against the debtor and property of the debtor." 11 U.S.C. § 502(b)(1).

B. Partner Liability Is Not Secondary ("Derivative") Liability.

The United States borrows the concept of secondary (or "derivative") liability in its brief and fails to provide it a definition. There are a number of different kinds of secondary liability for a tax owed only by the "taxpayer." Some types of secondary liability involve the imposition of liability on third parties pursuant to federal law, while other types of secondary liability involve the imposition of liability on third parties pursuant to state law. This can be an important distinction in the method by which the IRS attempts collection from secondarily liable parties and in differences in the periods of limitation governing such collection efforts. There are even important distinctions, involving collection practices and periods of limitation, among the various types of secondary liability imposed under federal law. The United States' Brief incorrectly treats the various types of secondary liability as if they are identical in all respects.

There is one thing that all types of secondary liability have in common: Every person or entity that is secondarily liable for the tax is a person or entity *other than the person who is identified as the taxpayer under I.R.C. §6203.* In other words, persons not liable for the tax can be held secondarily liable for a tax. Because secondarily liable persons are, by definition, not the "taxpayer," the collection procedures applicable to "taxpayers" do not necessarily apply to

the collection of the secondary liability from these parties. In fact, the United States' Brief fails to acknowledge that none of the provisions involving secondary liability discussed below permit the IRS to take *administrative collection action* against those asserted to be secondarily liable unless the IRS has made a *separate assessment* against that person[6].

1. Secondary Liability Can Be Imposed By Federal Law

a. Lender Liability (I.R.C. §3505)

I.R.C. §3505 allows the IRS to collect a portion of the taxes shown on a taxpayer's Form 941 (Federal Employment Tax Return) from a lender or other third party who pays the wages of the taxpayer's employees directly, I.R.C. §3505(a), or who supplies funds to a taxpayer for the purpose of paying the taxpayer's wages knowing that the taxpayer will not be making federal tax deposits of the employment taxes incurred by the taxpayer as the result of payment of the wages. I.R.C. §3505(b).

This Court held in *Jersey Shore State Bank v. United States*, 479 U.S. 442 (1987), that the IRS was not required to provide notice and demand for payment under I.R.C. §6303(a) to a party which the IRS was seeking to hold liable under I.R.C. §3505. In reaching

[6] The IRS discusses in its brief what it claims are its general practices in pursuing collection action against general partners for partnership taxes. Brief for the United States at p.28. As is discussed below, the IRS's discussion of its own practices is not accurate.

this conclusion, this Court noted that the lender's liability might very well be less than the amount stated in the I.R.C. §6303(a) notice. 479 U.S. at 446-447. This Court also noted that the IRS may not seek to impose liability against a party under I.R.C. §3505 by taking administrative collection action, but only by bringing suit. 479 U.S. at 447-448.

Liability under I.R.C. §3505 is for an amount less than the original tax assessed against the primarily liable "taxpayer." The IRS may not seek administrative collection action against the third party pursuant to I.R.C. §3505 based upon the original assessment for the taxpayer. Rather, the IRS must bring suit in court against the third party to enforce this liability.

b. Responsible Person Liability (I.R.C. § 6672)

I.R.C. §6672 allows the IRS to impose secondary liability on persons who qualify as so-called "responsible persons" to the extent of the "trust fund" portion of the tax shown on a taxpayer's employment tax returns (Forms 941) and other federal returns for taxes which the taxpayer is supposed to withhold from its employees and remit to the federal government. These "trust fund" taxes for which the IRS can impose liability under I.R.C. §6672 are less than the amount of taxes for which the taxpayer is liable. *See Slodov v. United States*, 436 U.S. 238 (1978)

Section 6672 establishes a special administrative procedure for asserting secondary liability under that section. The IRS is required to issue a written notice to each person who the IRS proposes to hold liable. I.R.C. §6672(b). The person is then granted administrative

appeal rights. *Id.* If the person fails to appeal or is not successful with the administrative appeal, the IRS then makes a separate assessment against the person, thereby creating a new "taxpayer" for purposes of the tax collection process.[7] There is a three year period of limitations on the ability of the IRS to assess third parties under I.R.C. §6672 which incorporates I.R.C. §6501, *Lauckner v. United States*, 68 F.3d 69 (3rd Cir. 1995), *Jones v. United States*, 60 F.3d 584 (9th Cir. 1995).

In summary, liability under I.R.C. §6672 is for an amount less than is owed by the original taxpayer. The IRS may not take administrative collection action to collect this liability directly from secondarily liable persons based upon the initial assessment against the taxpayer. Rather the IRS must make a separate assessment against the third party and treat them as a "taxpayer" in their own right. There is a three-year statute of limitations on making an assessment against a third party under I.R.C. §6672.

c. Transferee Liability

Federal law imposes substantive liability on certain transferees of federal taxpayers. I.R.C. §6324(a) provides that a transferee of a decedent's estate is personally liable for the estate tax owed by the decedent's estate "to the extent of the value, at the time of the decedent's death" of the property transferred to that third party. Similarly, I.R.C.

[7] The IRS will collect the "trust fund" taxes only once, so that payment of those taxes by the initial "taxpayer" (the employer) will result in the IRS forgoing collection activity from the "responsible person(s). *See United States v. Energy Resources Co., Inc.*, 495 U.S. 545 (1990).

§6324(b) of the Internal Revenue Code provides that a donee of a gift shall be liable for the gift tax owed by the donor to the extent of the value of such gift.

I.R.C. §6901 provides a procedure for making separate assessments against transferees for their personal liability for the pertinent portion of the original taxpayer's estate or gift tax liability. Section 6901 also provides a period of limitations on assessing transferees under that section. I.R.C. §6901(c). Thus, if the IRS follows the procedures set forth in I.R.C. §6901, the persons who are secondarily liable for some portion of the taxpayer's estate or gift tax will be assessed separately for the pertinent portion of the original tax liability for which they are liable.

Most courts have held that the IRS, in pursuing such transferees, has the option of either assessing the transferees individually pursuant to I.R.C. §6901, within the period of limitations imposed by that section, or filing a court action against the transferee. *See, e.g., United States v. Botefuhr*, 309 F.3d 1263 (10th Cir. 2002), *United States v. Russell*, 461 F.2d 605 (10th Cir. 1972), *contra, United States v. Schneider*, 92-2 U.S.T.C. ¶60,119 (D.N.D. 1992). None of the cases cited here or in the Brief for the United States state that the IRS may take administrative collection action to enforce the personal liability of a transferee without first making a separate assessment against the transferee under I.R.C. §6901.[8]

Liability under the federal transferee provisions set forth in I.R.C. §6324 is limited to the extent of the

[8] The concept of asserting personal liability against a transferee is to be distinguished from efforts by the IRS to enforce a lien against property which is in the hands of a transferee. *See Ripley v. Commissioner*, 102 T.C. 654 (1994).

value of the property received by the transferee from the estate or donor, respectively. The IRS may not take administrative collection action to enforce personal liability against the transferee based upon the assessment against the original taxpayer. Rather, the IRS must either assess the transferee personally under I.R.C. §6901 or bring suit in court against the transferee. An assessment of federal secondary liability under I.R.C. §6901 is subject to the independent period of limitations set forth in that section.

There are additional types of federal secondary liability, i.e., 31 U.S.C. §3713,[9] but the examples set forth above are sufficient to illustrate the diverse manner in which federal law deals with enforcement of secondary liability for taxes.

2. Secondary Liability Can Be Imposed By State Law

There are occasions where state law provides the IRS with the means to hold a party secondarily liable for a tax owed by the taxpayer. Typically, these occasions involve an assertion by IRS of a fraudulent conveyance from the taxpayer to another or a person's assumption of the tax liability of another under state law. This Court stated in *Commissioner v. Stern*, 357 U.S. 39 (1958), that the IRS has two ways in which it can assert transferee liability under state law. First, the IRS can assess the third party individually pursuant to the procedures set forth in what is now

[9] This section provides priority treatment for federal debts in the case of insolvent decedent's estates. *See United States v. Estate of Romani*, 523 U.S. 517 (1998).

I.R.C. §6901. Second the IRS can initiate court action against the third party based upon state law fraudulent conveyance laws. *Id.* at 43. Thus, I.R.C. §6901 and its predecessor were only intended to be a procedural mechanism for asserting liability under state law. *Id.* at 42.

In *Stern* this Court declined the IRS's invitation to hold that the predecessor to I.R.C. §6901 mandates the creation of a body of federal substantive decisional law dealing with transferee liability. This Court stated that such a result would have been "a sharp break with the past," noting that the lower courts had previously relied on state law to decide transferee liability cases involving the IRS and that the IRS itself had relied on state law in similar cases. *Id.* at 44. This Court then went on to note that Congress was aware of this practice when it enacted the predecessor to I.R.C. §6901 and refrained from disturbing the prevailing practice when it enacted that statute.

> Since Congress has not manifested a desire for uniformity of liability, we think that the creation of a federal decisional law would be inappropriate in these cases. . . . . Accordingly, we hold that, until Congress speaks to the contrary, the existence and extent of liability should be determined by state law. *Id.* at 45.

Both the existence and extent of a general partner's liability for partnership debt is determined (created) by state law (see California Corporations Code §16306(a) and footnote 3 *infra*). Some courts have held that the IRS is no different than any other litigant which invokes state fraudulent conveyance laws and is bound by state periods of limitation on such actions.

United States v. Vellalos, 780 F. Supp 705 (D. Hawaii 1992), *appeal dismissed*, 990 F.2d 1265 (9th Cir. 1993)(unpublished table decision). Other courts have held that the IRS is not bound by state periods of limitation on fraudulent conveyance and transferee liability actions even where the sole basis for the assertion of secondary liability is state law and the state period of limitations on such suits would have barred such an action had the plaintiff been any party other than the federal government. *Bresson v. Commissioner*, 213 F.3d 1173 (9th Cir. 2000). Rather, these courts hold that the IRS may assert secondary liability under state fraudulent conveyance laws at any time during the ten year federal limitations period for collection against the original taxpayer, even if such an assertion of secondary liability would be barred applying the same state law which created the right of the IRS to assert secondary liability. This rationale, however, applies because the liability is created by federal statute which has its own limitations period (I.R.C. §6901).

Respondents discuss below how the IRS is barred by state periods of limitation, the same as any other litigant, whenever the IRS invokes state law to assert secondary liability beyond the state period of limitations. For purposes of the present discussion, it is sufficient to note that the lower courts are divided on the issue of whether the IRS must be treated the same as any other litigant when it invokes state law to assert secondary liability.

C. Partners Are Taxpayers under the IRC and must Be Assessed or Sued for the Partnership Tax Debt.

1. The Respondents Are Liable for Partnership Tax Debt, and the Debt Is Unenforceable Due to the Expiration of the Limitations Period of I.R.C.§ 6501(a)

I.R.C. §7701(a)(14) defines a "taxpayer" as "any person subject to any internal revenue tax." A "person" includes an individual, a trust, estate, partnership, association, company or corporation. I.R.C. §7701(a)(1). An "individual" is included in the statutory definition of "person" and "person" is included in the statutory definition of "taxpayer." An "individual" can be a partner but a partnership is distinct under I.R.C. §7701. While the Internal Revenue Code defines the terms "partnership" and "partner" in I.R.C. §7701(a)(2), there is no provision in the Internal Revenue Code which states that general partners are liable for taxes of a partnership.[10]

Such a result is also consistent with this Court's opinion in *United States v.Williams*, 514 U.S. 527 (1995). In *Williams*, this Court held that a person who

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[10] The Internal Revenue Code contains detailed provisions for the audit of Forms 1065 filed by so-called "TEFRA" partnerships. See I.R.C. §6221 et seq. These provisions deal with the audit process, judicial review of the results of the audit of the Form 1065, and the assessment of income tax deficiencies resulting from such administrative and judicial proceedings. The provisions do not deal with the collection of taxes or with employment taxes. Indeed, partners, not the partnerships themselves, are liable for any taxes owed on partnership income.

was not personally liable for the tax, but on whose property the IRS held a lien, was a "taxpayer" for purposes of I.R.C. §7701(a)(14). Such a taxpayer could bring a suit for the refund of amounts paid to satisfy a federal tax liability. Because Respondents here are personally liable for the tax, this Court need not go as far as it did in *Williams* when it held that a person who is not being held personally liable for a tax liability can be a "taxpayer" under I.R.C. §7701(a)(14). This Court's ruling in *Williams*, however, is consistent with the concept of treating Respondents as "taxpayers" for purposes of the IRS assessing and collecting The Partnership's tax liabilities from them personally.

I.R.C. §6201 authorizes the Secretary of the Treasury to make assessments imposed by the Internal Revenue Code. With respect to taxes shown on "balance due" returns filed by taxpayers (which is the case here), I.R.C. §6201(a) provides that the "Secretary shall assess all taxes determined by the taxpayer or by the Secretary as to which returns or lists are made under this title."

Section 6203, entitled "Method of Assessment," states that "[t]he assessment shall be made by recording the liability *of the taxpayer* in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary" (emphasis added). Regulations promulgated under I.R.C. §6203 provide for the manner in which the liability a particular taxpayer is "assessed," i.e., recorded on the books and records of the IRS. 26 C.F.R. §301.6203-1. These regulations provide for recording of both the amount of a tax liability and the name(s) of the person(s) liable for the tax liability. *Id.*

I.R.C. §6303 provides that the Secretary "*shall*, as soon as practicable, and within sixty days, after the

making of an assessment of a tax pursuant to I.R.C. §6203, *give notice to each person liable for the unpaid tax*, stating the amount and demanding payment thereof" (emphasis added). This notice "shall be left at the dwelling or usual place of business of such person, or shall be sent by mail to such person's last known address." Once the IRS has made an assessment of a tax against a particular taxpayer, the next step is for the IRS to send that taxpayer notice and demand addressed to the taxpayer's proper address within sixty days of the assessment. Failure to provide the taxpayer with proper notice and demand within sixty days of the assessment bars the IRS from taking administrative collection action against the taxpayer and stops the running of interest on the tax debt. *See United States v. Chila*, 871 F.2d 101 (11th Cir. 1989), *United States v. Berman*, 825 F.2d 1053 (6th Cir. 1987), *Resyn Corp. v. United States*, 945 F.2d 1279 (3rd Cir, 1991), *Blackston v. United States*, 778 F. Supp. 244 (D. Md. 1991).

In addition, the language of I.R.C. §6303, which requires the IRS to give notice and demand to "each person liable for the unpaid tax," is broad enough to apply to efforts by the IRS to administratively collect the partnership tax debt from a general partner after assessing that general partner personally under I.R.C. §6203. There is no doubt that a partner of a general partnership, by virtue of their joint and several liability for the entire amount of the tax under state law, is a "person liable for the unpaid tax" of the partnership. This is to be contrasted with the situation faced by the Court in *Jersey Shore State Bank*, 479 U.S. 442, where liability under I.R.C. §3505 is a separate debt for an amount less than the amount owed by the "taxpayer." *Jersey Shore*, 479 U.S. at 447.

The relevant statutes dealing with the assessment and collection of taxes from "taxpayers" are sufficiently broad to permit this Court to hold that the IRS must treat general partners as "taxpayers" primarily liable for the partnership taxes. To make an assessment with respect to a taxpayer the IRS must make an assessment within three years of the "due date" of a timely filed partnership tax return. A "taxpayer" is defined as "any person subject to any internal revenue tax." I.R.C. §7701(a)(14).

I.R.C. §6321 provides that "if any person *liable to pay any tax* neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property. . . belonging to *such person*" (emphasis added). The I.R.C. §6321 lien, by the statute's own terms, attaches only to the property of the person who is liable for the tax.

I.R.C.§6323 provides for the filing of a notice of federal tax lien to perfect the IRS's lien against certain third party purchasers and creditors. Thus, if a taxpayer is assessed a tax, is given timely notice and demand and thereafter fails to pay the tax, the next step is for the IRS to file a notice of federal tax lien against the taxpayer to perfect the IRS's lien vis-a-vis third parties.

I.R.C. §6320 provides for administrative and judicial appeal rights when the IRS has filed a notice of federal tax lien against a "person described in I.R.C. §6321... ." Thus, where the IRS has filed a notice of federal tax lien against a person liable for the tax (i.e. a person primarily liable for the tax), that person may appeal (after the fact) the IRS's decision to file a notice of federal tax lien.

I.R.C. §6330 provides that the IRS may not levy

"on any property or right to property of any person unless the Secretary has notified such person in writing of their right to a hearing" under that section. The IRS has interpreted I.R.C. §6330 to only apply to the "person liable to pay the tax due after notice and demand who refuses or neglects to pay." Treas. Reg. §1.301.6330-1(a)(3)(Question A-1). Assuming that a taxpayer is assessed a tax, is given timely notice and demand for payment and thereafter fails to pay the tax, and then has a notice of federal tax lien filed against it, the next step, if the tax remains unpaid, is for the IRS to send a notice of intent to levy to the person(s) primarily liable for the tax. That person(s) may then appeal (before the fact) the IRS' decision to levy on the taxpayer's property.

The language of I.R.C. §6011(b) also supports treating Respondents as "taxpayers" against whom the IRS must proceed by assessing the tax within the statute of limitations set forth in I.R.C. §6501. That section authorizes the IRS to require the information that is "necessary or helpful in securing proper identification" of persons subject to FICA and withholding taxes. This statute expressly authorizes the IRS to require that employment tax returns (Forms 941) filed by partnerships include the names, addresses and identifying numbers of the partners of the partnership so that the IRS can assess the partners (in addition to assessing the partnership) as persons "subject to" the taxes in question.

As can be seen from the statutes and regulations above, there is a comprehensive statutory scheme that must be followed when the IRS seeks to collect taxes against a person primarily liable for a tax. The first step in that process, however, is to record the liability of that person on the books and records. I.R.C. §6203.

As is discussed in greater detail below, the IRS can not assess a tax without reference to a particular taxpayer. To do so would run afoul of the statutory scheme for administrative collection of the tax and possibly the Due Process Clause of the Fifth Amendment.

A holding that the IRS is required to assess Respondents individually to collect partnership taxes from them (because Respondents are primarily liable for the tax) will also avoid potential administrative difficulties for the IRS. Under the IRS's position, it is unable to make assessments directly against general partners to collect the taxes of the partnership because they are not "taxpayers" primarily liable for the tax. In addition, the IRS clearly is unable to make any assessments against general partners under I.R.C. §6901 based on secondary liability. I.R.C. §6901 is generally not applicable to the collection of employment taxes, the type of taxes owed by the partnership in which Respondents were partners. I.R.C. §6901(a)(1).[11] This leaves the the IRS with only one option to collect what the IRS claims is a partner's secondary liability for a partnership's taxes; file an action in court against the general partner. It is obviously a much heavier burden for the IRS to proceed to court against a general partner on secondary liability than it is for the IRS to assess a general partner as a person primarily liable for partnership taxes.

Failing to determine general partners are taxpayers (and thereafter requiring the IRS to assess Respondents individually within the three year period of limitations in I.R.C. §6501) thrusts the IRS into a

[11] The only circumstances under which I.R.C. §6901 authorizes the IRS to assess employment taxes directly against a third party is where a partnership has been liquidated. I.R.C. §6901(a)(2).

situation where the only way it could collect partnership taxes from the general partners would be to file a court action, based upon state law, against the general partners. Why is the IRS denying its ability to separately make assessments for general partners as taxpayers just as its own counsel advised thirty years ago when it recommended assessment of both a partnership and the general partners for taxes owed by the partnership?

2. Other Circuit Decisions Are Not in Conflict with the Ninth Circuit's Holding in this Case Because They Did Not Decide the Same Issue

The Government cites numerous cases for the proposition that general partners are liable for the tax debts of the partnership, including *Young v. Riddell*, 283 F.2d 909 (9th Cir. 1960), *United States v. Papandon*, 331 F.3d 52 (2nd Cir. 2003), *Remington v. United States*, 210 F.3d 281 (5th Cir. 2000), *Ballard v. United States*, 17 F.3d 116 (5th Cir. 1994), *United States v. Hays*, 877 F.2d 843 (10th Cir. 1989), *Calvey v. United States*, 448 F.2d 177 (6th Cir. 1971), and *Tony Thornton Auction Services, Inc. v. United States*, 791 F.2d 635 (8th Cir. 1986). For the most part, these cases do not add anything to the United States' analysis beyond the citation to §16306(a) of the California Corporations Code (West Supp. 2003), which states that general partners are jointly and severally liable for the debts of a general partnership. There is no dispute on this proposition of law. These decisions, never address the question of *how the IRS must enforce the personal liability of the general partners for the partnership's taxes.* The Ninth Circuit's opinion in *Young v. Riddell*

merely states that a putative partner of a partnership who has already paid the partnership tax liability can not obtain a refund of the amounts paid where he fails to prove he was not a partner. This opinion does not address the issue of how the IRS enforces the *collection* of the partner's liability.

The Government cites a number of cases in its brief, but none of them address in any detail the issue of whether the IRS should collect partnership taxes from general partners through the assessment and collection process governing primary liability or instead through court action associated with secondary liability.

The Second Circuit's opinion in *Papandon* notes that the IRS made assessments directly against the partners based upon New York law similar to §16306(a) of the Cal. Corp. Code. *Papandon*, 331 F.3d 52 at n. 2. Thus, the Second Circuit's opinion hardly stands for the proposition that the IRS is not required to assess a partner within the three year statute of limitations on assessment under I.R.C. §6501 as a "taxpayer" primarily liable for the partnership's taxes.

Other cases where the taxes had not been paid as of the start of the litigation, such as *Remington*, *Ballard*, *Hays* and *Tony Thornton Auction Service*, never addressed whether the IRS must collect the liability of a general partner for a partnership's tax liability as primary liability through administrative collection activities or as a secondary liability through court action. This may have been because arguing that the IRS must assess against the partner individually within the three-year period of limitations of I.R.C. §6501, would have been a fruitless act. If it sued in court prior to the expiration of the three year period of limitations for assessment, the IRS could have obviated any argument that it had to make an assessment as to

the partner as a "taxpayer" by filing a timely (prior to the expiration of the three-year period of limitation) cross action. *Cf. Berman*, 825 F.2d 1053, (IRS's failure to give proper notice and demand did not bar timely suit for judgment even though it barred administrative collection action).

Of course, it is also possible that the partners in the cases referenced above failed to consider the argument that the IRS must assess a partner's primary liability for partnership tax debt within the three year period of limitations under I.R.C. §6501, even though a successful assertion of the argument would have entitled the partners to prevail against the IRS. Such a failure of advocacy appears to have happened in the case of *United States v. Wright*, 57 F.3d 561 (7th Cir. 1995).

In *Wright*, the Seventh Circuit held that the filing of a bankruptcy by a taxpayer partnership operated to toll the period of limitations on collection action against the general partners for the partnership taxes. A review of both the Seventh Circuit's opinion and the opinion of the District Court which the Seventh Circuit reversed, *United States v. Wright*, 868 F. Supp. 1070 (S.D. Ind. 1994), reveals that the partners failed to argue that the proper method for holding them liable for the partnership taxes was for the IRS to assess them individually as primarily liable. The District Court found that the IRS had assessed the partners individually *Wright*, 868 F. Supp. at 1071, while acknowledging that the IRS claimed that the assessments were made only against the partnership. *Id.* The District Court did not think this factual dispute was material.

On appeal, the Seventh Circuit did not even address this factual dispute. Rather, in reversing the

District Court, the Seventh Circuit cited to this Court's Decision in *United States v. Updike*, 281 U.S. 489 (1930), to support the proposition that a "claim against derivatively liable persons remains alive under federal law so long as the taxpayer itself is liable." *Wright*, 57 F.3d at 563. *Updike*, however, involved an assertion of transferee liability, an example of secondary liability. In deciding that the filing of a bankruptcy by the taxpayer tolls the statute of limitations on the ability of the IRS to pursue a party who is secondarily liable for the taxes, the Seventh Circuit did not address the question of whether a general partner is primarily liable or secondarily liable for the partnership taxes. It assumed that partners are secondarily liable for partnership taxes because the issue was not contested by the Wrights.[12].

The Seventh Circuit, and the parties, therefore, appear to have never considered the possibility that the proper way for the IRS to have asserted liability against the partners was to assess them individually and that any failure to make such an assessment within the three year period of limitations for assessment precluded the IRS from pursuing the partners individually. Had such an argument been made by the partners and entertained by the Seventh Circuit, the factual dispute dismissed by the District Court as

[12] "...first that the debt to be collected from the Wrights is for 'taxes', and so is governed by federal rather than state law, and second that the claim against derivatively liable persons remains alive under federal law so long as the taxpayer itself is liable. The Wrights do not contest the first of these steps". *Id.* at 563. It is undisputed by the parties in *Wright* that the taxpayer was the partnership. Timely notice and demand to the partnership is presumed and gave rise to the ability to *collect the partnership's taxes* for a ten-year period under I.R.C. §6502.

immaterial would have moved center stage. If the IRS had never assessed the partners individually within the three year period of limitations imposed by I.R.C. §6501, then, had the Court accepted the position that partners must be treated as "taxpayers" primarily liable for the taxes, the IRS could not have pursued the partners individually for the partnership taxes (because of the IRS's failure to timely assess the individual partners). On the other hand, if the IRS had made separate assessments for the Wrights (as was found by the District Court) under I.R.C. §6501, those separate assessments would have resulted in an independent ten-year limitations period to collect from the Wrights. (That separate limitation period could have expired). If the parties subject to the assessment by the IRS, were the individual partners, the filing of the partnership bankruptcy should have had no effect whatsoever under those circumstances. The Seventh Circuit appears to have assumed that the underlying assessments were made only against the partnership, notwithstanding the finding of the District Court to the contrary. It then proceeded to reach the conclusion that, where a partnership has been assessed for taxes and thereafter files for bankruptcy, the bankruptcy suspends the limitations period for the IRS to pursue secondary liability against the partners. Assuming, arguendo, that a partner's liability for partnership taxes is secondary liability as the IRS contends, the Seventh Circuit's conclusion is incorrect for the reasons explained in the following section.

D. If Partners Are Not Taxpayers, Their Liability Arises Only under State Law and Enforcement Is Governed by State Limitation Periods

Assuming, arguendo, that Respondents are to be treated as persons who are secondarily liable for the partnership taxes, the United States is incorrect when it argues that secondary liability for taxes is always governed by the ten year federal statute of limitations on collection set forth in I.R.C. I.R.C. §6502. Where secondary liability is based upon state law, the IRS is bound by the state period of limitations the same as any other creditor.

The United States cites a number of cases in support of the proposition that, once the IRS makes an assessment against the partnership, the IRS can pursue the general partners for the partnership's taxes for the entire ten-year statute of limitations under I.R.C. §6502. As shown above, this analysis is incorrect if the Respondents are considered "taxpayers" against whom the IRS must make assessments within the three year period of limitations imposed by I.R.C. §6501.

Many of the cases cited by the IRS deal with transferee liability asserted by the IRS under *federal* law and are therefor inapplicable to the present case, which, to the extent it involves secondary liability, involves secondary liability under *state* law. This is particularly true where, as is the case here, there is no statutory mechanism equivalent to I.R.C. §6901 which would allow the IRS to administratively assess secondary liability under state law. For example, the IRS cites to *United States v. Botefuhr*, 309 F.3d 1263 (10th Cir. 2002), noting that the Court held that the failure of the IRS to assess a transferee gift tax liability

against a donee did not preclude the IRS from bringing suit against the transferee within the ten year statute of limitations on collection against the underlying taxpayer. This holding deals only with *federal* transferee liability created under I.R.C. §6901. It does not address whether, in asserting liability under state law, the IRS is bound by state statutes of limitation. Notably, however, the case does not stand for the proposition that the IRS may take administrative collection action against the transferee without a separate assessment against the transferee. Rather, the IRS must assert third party liability by lawsuit in the absence of a separate assessment against the purported transferee.

Similarly, the IRS cites to *United States v. Hunter Engineers & Constuctors, Inc.*, 789 F.2d 1436 (9th Cir. 1986), *cert.* denied, 479 U.S. 1063 (1987), *United States v. Dixieline Financial, Inc.*, 594 F.2d 1311 (9th Cir. 1979), and *United States v. First National Bank of Circle*, 652 F.2d 882 (9th Cir. 1981), all of which involve the assertion of liability under federal law, i.e., I.R.C. §3505. None of these cases address the question of the procedures that govern the IRS's assertion of secondary liability under state law.

The IRS fails to even mention, let alone discuss, this Court's most recent pronouncement in *Commissioner v. Stern*, 357 U.S. 39, regarding the IRS's assertion of liability against a third party under state law, pursuant to I.R.C. §6901. The IRS argued in that case that its lien attached to the insurance proceeds paid to a third party from a policy on the taxpayer's life, although state law provided that creditors of the decedent taxpayer could not pursue the third party for the insurance proceeds. In holding that state law governed the resolution of the case, this

Court stated:

> The Government's substantive rights in this case are *precisely those which other creditors would have under Kentucky law*. The respondent is not liable to the Government because Kentucky law imposes no liability against respondent in favor of [the decedent's] other creditors. *Id.* at 47 (emphasis added).

This Court made it very clear that, when the IRS asserted liability under state law, the IRS's rights are precisely the rights of any other creditor under state law.

In the case of *United States v. California*, 507 U.S. 746 (1993), this Court acknowledged that "[w]hether in general a state-law action brought by the United States is subject to a federal or state statute of limitations is a difficult question." In *dicta*, this Court analyzed the Government's argument that it is not bound by state statutes of limitation, and pointed out that the Government only cited cases including *United States v. Summerlin*, 310 U.S. 414, 416 (1940), in which "either the right at issue was obtained by the Government through, or created by, a federal statute", and *United States v. John Hancock Mut. Life Ins. Co., 364 U.S. 301 308 (1960)*, in which "a federal statute provided the statute of limitation." (28 U.S.C. §2410(c). Although the question was not answered in *California*, a logical inference might be that when the right at issue arises under state law, the state statute of limitations should apply. Indeed, the United States acknowledges in its Brief at page 10: "The government's derivative claim against the partners for the recovery of taxes owed by the partnership is based upon state partnership law."

In the absence of a California law provision providing that general partners are liable for the debts of the partnership, the United States would have no right to pursue Respondents in their capacity as general partners for the partnership tax debt. Thus, the United States is not asserting rights directly against Respondents which were obtained by federal statutes. The fact that federal law governs the efforts of the IRS to collect from the initial taxpayer does not mean that an effort to collect from a third party based on state partnership law involves enforcing federally created rights.

The limitations periods for asserting liability against Respondents under California law is decidedly not a federal period of limitations. That period of limitations is three years. *See* Cal. Code Civ. P. §338(a) (Three year statute of limitations on action for liability created by statute).

None of the cases cited by the United States regarding liability asserted under state law affect the analysis set forth above. The case of *Updike v. United States*, 281 U.S. 489, stands only for the proposition that, once the federal period of limitations for collection against a taxpayer has expired for a particular liability, all efforts by the IRS to collect that liability, including efforts to collect from third parties based upon state law, are barred. This Court did not preclude the possibility that, where the IRS is asserting secondary liability under state law, the state limitations period will bar a suit by the IRS for secondary liability to the extent such suits by private parties are also barred, even though the federal statute of limitations on the ability of the IRS to take collection action against the

taxpayer has not yet expired.[13]

The case of *United States v. Wright*, 57 F.3d 561, does not even address the issue of whether the state period of limitations bars the IRS from asserting liability for a partnership tax debt under state law. All parties in that case assumed that the only relevant period of limitations was the federal statute (I.R.C. §6502). Thus, *Wright* is of no assistance whatsoever to deciding the issue of whether state statutes of limitation apply to the IRS when it asserts secondary liability under state law.

E. The Administrative Practices of the IRS Evidenced by its Guidelines and the Cases it Cites Contradicts the IRS's Position in this Case

The statutory scheme contemplates and requires certain steps before the summary collection process is available to the IRS.. It contemplates an assessment of the tax as to a taxpayer (I.R.C. §6501). It requires notice of demand to be given to the "person liable for the tax" (I.R.C. §6303). Once these steps have been taken, the IRS is empowered to collect the tax by distraint.

The IRS instructs its employees that they may take administrative collection action against the general partners personally, including the filing of lien notices and the issuance of levies, based solely on the assessment naming the partnership and a notice and

[13] The IRS has not let this Court's opinion in *Updike* prevent it from invoking state law to assert secondary liability even where the federal statute of limitations on collection had expired. *See United States v. Scott*, 167 F.2d 301 (8th Cir. 1948).

demand issued to the partnership. Internal Revenue Manual §5.17.3.5.16(2) states that, where a partnership incurs taxes, "the partnership property may be levied upon as well as the property of each partner, to the extent a partner is liable for partnership debts." Internal Revenue Manual § 5.12.1.14.1(3) provides that "[w]here a partnership is the taxpayer and employment taxes are involved, the NFTL [notice of federal tax lien] should be prepared showing the words 'a partnership' after the partnership name AND list the names of all known general partners...."

Internal Revenue Manual §5.12.1.18.3(1) states that "[p]artners are individually liable for partnership debts, and *separate assessments against them are not essential* to sustain their individual liability." (emphasis added). Section 5.12.1.18.3(3) goes on to state that "[a] supplemental assessment will not be required when adding an individual partner's name to the partnership assessment. The Service will rely on the preposition [sic] that the assessment against the partnership creates a FTL [federal tax lien] against each individual partner."

Even though the IRS takes the position that it can levy on the property of general partners to collect a partnership tax liability without assessing the general partner, the IRS instructs its employees to *not* send an original Notice of Intent to Levy required by I.R.C. §6330 to the individual general partners. Internal Revenue Manual §5.11.1.2.2.5.

As these Manual provisions demonstrate, the IRS takes the position that, once it assesses a tax liability for a partnership, the IRS need not make separate assessments naming the general partners to begin taking collection action, including the filing of lien notices and the issuance of levies, directly against those

partners. The IRS also takes the position that, once it assesses a tax liability naming a partnership, it can levy against the property of the general partners without providing an I.R.C. §6330 notice to the partners.

The Brief for the United States suggests that, if the Court rules in favor of Respondents, such a ruling will force the IRS to pursue collection activity against general partners "prematurely." The United States represents its collection practices as: "Until now the IRS has typically pursued collection of partnership tax obligations from the partnerships before commencing litigation with partners to satisfy outstanding tax obligations. Under the abbreviated limitations period that would result from the decision in this case, however, the Government would be forced to bring collection suits against partners within the three-year period prescribed in I.R.C. §6501(a), even though parallel efforts against the partnership may remain ongoing." Brief for United States at p. 28. The language quoted above leaves the reader with the impression that 1) the IRS generally exhausts collection action against the partnership before pursuing collection action against the general partners, and 2) when the IRS pursues a general partner for a partnership tax debt it does so judicially rather than through administrative collection action.

As can be seen from the excerpts from the IRS's own Manual for its employees, the United States does not accurately state in its Brief what steps the IRS normally takes when a general partnership incurs tax liabilities. This failure not only leaves the Court with an inaccurate impression of how the IRS "does business" but also attempts to sidestep important statutory and Constitutional issues discussed below.

The IRS also argues that, because the IRS only

assesses "the tax" and not a particular taxpayer, citing *Anderson v. United States*, 15 F. Supp. 216 (Ct. Cl. 1936), the IRS can pursue a general partner for the partnership's taxes at any time during the period of limitations on collection after assessing the tax against the partnership. This is an incorrect statement of the law which obfuscates the distinction between primary and secondary liability for taxes. I.R.C. §6203 makes it quite clear that the IRS must record the liability *of the taxpayer* when making an assessment. The *Anderson* case involved facts which are so dissimilar to the present case so as to render the opinion irrelevant in the present context. To the extent the case has any relevance, the opinion fails to take into account the statutory language of what is now I.R.C. §6203. That language directs the IRS to record the liability of the taxpayer, not to record a liability without a name. That point is confirmed by Treas. Reg. §301.6203-1. The fact that the name of the taxpayer is recorded on a document separate from the RACS Report 006 or the Form 23C, see Brief for the United States at footnote 6, p. 13, is irrelevant. Without a name the assessment is incomplete and can not be enforced. I.R.C. §6203.[14]

Furthermore, recording a liability without a name is fruitless act, as the IRS must provide the person(s) "liable for the tax" with notice and demand for payment of the tax within sixty days of the date of assessment. I.R.C. §6303. This can not be done without a name, and, per I.R.C. §6203, that name must be that of the taxpayer, not that of an idle spectator or someone

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[14] The Internal Revenue Code goes even farther than requiring identification of a taxpayer by name. See I.R.C. §6109 (Requiring taxpayers to furnish an identifying number as established by regulations).

not yet known to the IRS.

As noted above, the IRS takes the position that it may take administrative collection action against general partners without making separate assessments against the general partners and without providing the general partners with timely individual notices and demand under I.R.C. §6303(a). Those two positions, positions which the IRS overlooks in its opening Brief, plainly violate the Internal Revenue Code as well as the Due Process Clause of the Fifth Amendment (see discussion below).

F. Treating General Partners as Taxpayers for Collection of Partnership Tax Debt Will Avoid the Need to Address Significant Statutory and Constitutional Issues Created by Current IRS Collection Practice

Due to the peculiar nature of the IRS's current collection practices when pursuing general partners for federal partnership taxes, treating the partners as third parties who are secondarily liable for the partnership taxes will force courts to address troublesome statutory and Constitutional issues. This can be avoided if the partners are treated as taxpayers primarily liable for the tax.

1. IRS's Current Collection Practices

As is discussed above, The IRS's practices, as reflected in the Internal Revenue Manual, are somewhat unusual. The IRS files notices of federal tax liens against partners to secure payment of partnership taxes without assessing the partners individually and without giving the individual partners

notice and demand. The IRS also levies on the property of partners to collect partnership taxes without assessing the partners individually, without giving them individual notices and demand for payment, and without sending them the notice required by I.R.C. §6330 before the IRS can levy.

The IRS has argued that notice and demand to the partnership operates as notice and demand to the partners, and several courts have agreed with this argument. *See, e.g., Adams v. United States*, 328 F. Supp.228 (D.Neb. 1971), *Underwood v. United States*, 118 F. 2d 760 (5th Cir. 1941), *contra, In re Robby's Pancake House, Inc.*, 24 B.R. 989 (Bankr. E. D. Tenn. 1982). The statutory and Constitutional obstacles to the IRS's argument are discussed below.

2. Statutory Issues Created by IRS's Current Collection Practices

The conduct of the IRS in this regard creates a number of statutory issues. As discussed previously, the IRS's practice of pursuing administrative collection action against general partners to collect partnership taxes without separately assessing each general partner and without providing each of them with individual notices and demand clearly violates the provisions of the Internal Revenue Code governing the assessment and collection of taxes. First, it is clear that both an assessment and timely notice and demand for payment of the amount assessed must be sent to a party before the IRS can take administrative collection action against that party to collect the taxes. I.R.C. §§6203, 6303, *See United States v. Chila*, 871 F.2d 101 (11th Cir. 1989), *United States v. Berman*, 825 F.2d 1053 (6th Cir. 1987), *Resyn Corp. v. United States*, 945 F.2d

1279 (3rd Cir, 1991), *Blackston v. United States*, 778 F. Supp. 244 (D. Md. 1991).[15] The IRS, in many cases, does not appear to name the general partners in separate assessments after making assessments against the partnership, notwithstanding the advice the IRS received from its counsel over thirty years ago.[16] No separate assessments were made against the partners in the present case. The absence of separate assessments against the individual partners followed by notices and demand for payment precludes the IRS from taking administrative collection action against the individual partners. *United States v. Chila, supra, United States v. Berman, supra, Resyn Corp. v. United States, supra, Blackston v. United States, supra.*

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[15] Courts have allowed the IRS to pursue collection action against third parties as "nominees" and "alter egos" of the taxpayer without affording those third parties any rights of "taxpayers" such as notice and demand. See, e.g., *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 350-351 (1977), *Wolfe v. United States*, 798 F.2d 1241 (9th Cir. 1986). These cases are arguably distinguishable because they involve a determination by the IRS that the third party should be disregarded and treated as the "taxpayer" (who presumably has already been afforded his/her statutory rights). To the extent the IRS relies on state law to make such determinations, however, the IRS, in asserting liability against third parties, even as "alter egos" or "nominees" of the taxpayer, should not have any greater remedies under state law than other creditors. *Commissioner v. Stern*, 357 U.S. 39.

[16] In theory, the IRS should be able to make "joint" assessments of the tax liability against the partnership and against the individual general partners. The IRS performs a similar function every time it assesses a joint income tax liability against both a husband and wife who file a joint income tax return. Presumably both spouses filing a joint return are entitled to separate notices and demand. And presumably the bankruptcy filing by one spouse does not affect the statute of limitations on collection against the other spouse.

Second, notice and demand for payment of the tax must be sent to a person's "last known address" or "usual place of business." I.R.C. §6303(a). The IRS, by virtue of the partnership income tax returns (Forms 1065) filed each year, is aware of each general partner's name, address and social security number. The IRS thus has the ability to access the address shown on both the most recently filed Form K-1 for each partner and on the most recently filed federal income tax return for each partner. Yet the IRS fails to send out individual notices and demand to the partners, relying instead upon the theory that notice and demand to the partnership is notice and demand to all partners.

This theory is in violation of the statute when the IRS is in possession of information showing that the "last known address" and "usual place of business" of a partner is an address other than the partnership address. See *Cool Fuel, Inc. v. Connett*, 685 F.2d 309 (9th Cir. 1982), 26 C.F.R. §301.6212-2(a).[17]

To be sure, when a partner's "usual place of business" or "last known address" is the partnership's address, it is possible that a notice and demand sent to the partner at the partnership's address will satisfy the statutory requirements under I.R.C. §6303(a). See *Wallin v. Commissioner*, 774 F.2d 674 (9th Cir. 1984) (notice of deficiency not sent to "last known address" but actually received on a timely basis was valid). Such notice, however, must be addressed specifically to the partner in order to properly advise him that the IRS is pursuing the partner's individual assets in its efforts to

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[17] The IRS gives its collection officers detailed instructions on how to determine a taxpayer's "last known address" when sending out a Notice of Intent to Levy under I.R.C. §6330. See Internal Revenue Manual §5.11.1.2.1.1.

collect the partnership taxes. A notice addressed to the *partnership*, even one sent to the partner's last known address, does not give the partner proper notice that the partner's own assets are at risk for administrative collection action. *See El Paso Refining, Inc. v. Internal Revenue Service*, 205 B.R.497 (W.D. Tex. 1996).

3. Constitutional Issues Created by IRS's Current Collection Practices

The protections and procedural safeguards afforded under the Due Process Clause of the Fifth Amendment, as applied to the federal government, and under the Due Process Clause of the Fourteenth Amendment, as applied to the states, have evolved from common law origins to guarantee the procedures necessary for the "protection of ultimate decency in a civilized society." *Adamson v. California*, 332 U.S. 46, 61 (1947).

> Early in our jurisprudence, this Court voiced the doctrine that "wherever one is assailed in his person or his property, there he may defend," *Windsor v. McVeigh*, 93 U.S. 274,277 (1876). *See Baldwin v. Hale*, 1 *Wall.* 223 (1864); *Hovey v. Elliott*, 167 U.S. 409 (1897). The theme that "due process of law signifies a right to be heard in one's defence," *Hovey v. Elliott, supra, at 417*, has continually recurred in the years since *Baldwin, Windsor, and Hovey*. Although "many controversies have raged about the cryptic and abstract words of the Due Process Clause," as Mr. Justice Jackson wrote for the Court in *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306 (1950), "there can be no doubt that at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.". . . "*What the Constitution does require is "an opportunity . . . granted at a meaningful time and in a meaningful manner."* *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)(emphasis added).

Boddie v. Connecticut, 401 U.S. 371, 377-378 (1971). Some exceptional situtations do allow for post-deprivation notice and hearing, but there must be "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993) (quoting *Boddie v. Conn.* at 379)

Over seventy years ago, Justice Brandeis and this Court, in *Phillips v. Comm. Internal Revenue*, 283 U.S. 589 (1931), considered whether post-deprivation judicial review would meet due process concerns after distraint for corporate tax debt against a transferee of corporate assets (limited to the amount received in transfer). Justice Brandeis noted that the remedy available to the transferee was the same as the remedy which would be available to the corporate taxpayer who transferred its assets. Although judicial review would be denied until after seizure, the transferee was entitled to pre-deprivation notice and the opportunity to file a petition with the Board of Tax Appeals. The underlying need of the Government to promptly secure its revenues balanced against the right to pre-deprivation *judicial* review. *Phillips* at 596. The

Commissioner would be required to answer and there would be "a complete hearing *de novo*, according to the rules of evidence and . . . .[t]he transferee has the right to a preliminary examination of books, papers, and other evidence of the taxpayer." *Phillips* at 598. Although a judicial remedy would be delayed, there would be a timely hearing and discovery to allow the transferee to pay the debt and stop the penalties and interest; protections, which the IRS would *now deny* to general partners.

The IRS asserts that the statutory scheme for assessment, notice, and demand provides that it must grant pre-deprivation rights to the partnership, but can deny those same rights to the general partners. This is especially egregious, considering that the IRS is claiming that the original three year federal period of limitation (I.R.C. §6501) could be extended against the individual partners for ten additional years (I.R.C. §6502(a)), without notice and an opportunity to either dispute the debt or pay the tax and stop the continued accumulation of interest and penalties. In the case now before this Court, the Proofs of Claim against the Respondents, Joint App. P. 100-104, demonstrate that the interest and penalties exceeded the original tax debt in five to six years. The IRS asserts that this debt can continue to grow for up to thirteen years without any notice to the individual general partners. This hardly seems to comport with the fundamental fairness of "*an opportunity . . . granted at a meaningful time and in a meaningful manner*" that the Due Process Clause mandates. *Boddie v. Conn.* at 378 and *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (both quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)(emphasis added))

In *Matthews* this Court discussed factors that

due process dictates in considering the type of remedy required:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. *Matthews v. Eldridge* at 335.

Respondents acknowledge the important governmental interest in collecting taxes. "[T]axes are the life-blood of government, and their prompt and certain availability an imperious need." *Bull v. United States*, 295 U.S. 247, 259 (1935). However, the burden on the IRS to assess, and give notice and demand for payment to the individual partners is negligible (the information is readily available to the IRS) compared to the harm - the continuing accumulation of interest and penalties without the individual partner's receipt of notice and the ability to pay the tax and/or dispute the debt. Surely, thirteen years of interest and penalties, without recourse, is not "*fundamentally fair.*"

In *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), this Court held that notice to a mortgagee of a pending tax sale by publication violated the Due Process Clause of the Fourteenth Amendment where the address of the mortgagee was publicly available for the purpose of providing personal notice. This Court stated that "notice by publication must be supplemented by notice mailed to the mortgagee's last

known available address, or by personal service."

The principle set forth in *Adams* applies with equal force to the IRS. When sending notice to the partners, the IRS may not rely on notice sent to the partnership. This is because the IRS has the actual addresses of the partners in its possession.

All of these statutory and constitutional issues need not be addressed, however, if this Court holds that Respondents are "taxpayers" who must be individually named by the IRS in an assessment of a tax within the three year period of limitations set forth in I.R.C. §6501.

CONCLUSION

California law imposes joint and several liability on partners; joint and several liability confers primary liability making the individual partners "taxpayers." The IRS then has a choice of remedies: It can sue under either state law or federal law pursuant to the limitations period of I.R.C. §6501(a) or can assess the tax against the partnership and against some or all of the general partners. The IRS has the means readily available to identify the individual general partners, and therefore, little additional burden falls on the United States in securing all those primarily liable. The assessment allows administrative collection and extends the time for suit against the *assessed taxpayers* for ten years from the date of assessment. Assessment "triggers" notice and demand for payment pursuant to I.R.C. § 6303 which allows the noticed taxpayers to elect to either pay the tax, interest and penalties which have accumulated, and stop further liability, or to continue liability and possible collection for additional penalties and interest. Assessment of the

individual partners extends the limitations period for the United States to pursue its collection activities against all those liable for the partnership tax debt.

The issue to be decided is not one of liability, but whether the tax debt is collectible against the individual general partners. The IRS did not obtain a judgment against the individual general partners, and the time to do so had expired. The assessment only extended the limitations period as to the Partnership; therefore, the IRS does not have allowable bankruptcy claims and the Ninth Circuit's decision should be affirmed.

The Government's claim that $10 billion is at stake because of the IRS's failure to timely assess individual general partners is indeed unfortunate. The statutory scheme enacted by Congress surely did not intend such "an intolerable drain on the public fisc." *United States v. California*, 507 U.S. 746, 759 (1993). If that is indeed the result of upholding the Ninth Circuit's decision in this case, it arises because the IRS failed to follow the advice of its own counsel to utilize its readily accessible information, to assess the individual partners, and to provide them notice and demand for payment. We must agree with the Seventh Circuit's statement in *Wright*, 57 F.3d at 564: "[W]e confess to puzzlement at the IRS's contention that federal law favors forswearing collection from partners until the partnership has run out of money. A credible threat to collect from the partners would improve the prospect of collecting from the partnership, to the benefit of the Treasury."

Respectfully submitted,

JOEL BARRY FEINBERG
Counsel of Record
DAVID R. HABERBUSH
HABERBUSH & CAMPBELL, LLP
444 West Ocean Blvd.
Suite 1400
Long Beach, CA 90802
(562) 435-3456
Attorneys for Respondents

A. LAVAR TAYLOR
CHARLES F. ROSEN
LAW OFFICES OF
A. LAVAR TAYLOR
6 Hutton Centre
Suite 880
Santa Ana, CA 92707
(714) 546-0445
Co-Counsel for Respondents